IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Appeal No. 20-0530

ANTERO RESOURCE CORPORATION,
Petitioner Below, Petitioner,

v.

Doddridge County Circuit Court
Civil Action No. 17-AA-1
Judge Christopher Wilkes

THE HONORABLE DALE STEAGER,
West Virginia State Tax Commissioner,
THE HONORABLE DAVID SPONAUGLE,
Assessor of Doddridge County, and
THE COUNTY COMMISSION OF DODDRIDGE COUNTY, Sitting as the Board of Assessment Appeals,
Respondents Below, Respondents.

BRIEF OF RESPONDENT, THE COUNTY COMMISSION OF DODDRIDGE COUNTY

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I. STATEMENT OF THE CASE

Respondent The County Commission of Doddridge County, sitting as the Board of Assessment Appeals (the "County Commission") offers the following statement of the case as necessary to correct inaccuracies or omissions provided by Petitioner Antero Resources Corporation ("Petitioner") in its brief. See W.Va. R. App. Proc. 10(d).

A. INTRODUCTION

This Court's opinion in *Steager v. Consol Energy, Inc.* 242 W.Va. 209, 832 S.E. 2d 135 (2019) (hereinafter "*Steager*") did not address wells that produce both oil **and** gas; instead, it dealt with Petitioner's appeal of the valuation of its natural gas producing horizontal wells. (A.R. 2201). In *Steager*, Petitioner did not object to the West Virginia State Tax Department's (the "Tax Department") methodology for taxing wells that produce both oil **and** gas (the "Oil and Gas Well Methodology"). In fact, for the very first time in the procedural history of this case, on remand from this Court to the Circuit Court pursuant to *Steager*, Petitioner raised an objection to the Oil and Gas Well Methodology. In Footnote 3 of Petitioner's Reply in Opposition to Respondents' Motions for Summary Judgment filed in the Circuit Court after remand from this Court, Petitioner admits that it did not raise the Oil and Gas Well Methodology prior to raising it for the first time on remand from this Court in Petitioner's Motion for Summary Judgment filed in the Circuit Court. (A.R. 2097).

In an attempt to raise an objection to the Oil and Gas Well Methodology for the first time on remand from this Court to the Circuit Court, even though the objection is not part of the appeal record from the County Commission that was certified to the Circuit Court, Petitioner characterizes and argues that the Oil and Gas Well Methodology is the "same" percentage valuation "this Court

rejected in Syllabus Point 12" of *Steager* whereby this Court struck down the Circuit Court's unauthorized utilization of the unlimited percentage expense deduction for valuing gas wells, i.e., allowing a 20% average annual industry operating expense deduction based on Petitioner's gross receipts without the imposition of a cap. (A.R. 0068). *Steager*, 242 W.Va. at 217, 832 S.E.2d at 143. Such characterization is completely untrue as the Oil and Gas Well Methodology was not raised before this Court in *Steager,* was not decided by this Court in *Steager*, and therefore, is not the "same" percentage valuation this Court struck down in *Steager*. In fact, just the opposite is true. On remand to the Circuit Court and consistent with this Court's decision in *Steager*, the Tax Department revalued Petitioner's wells that produced only natural gas, which were the only type of wells considered by this Court in *Steager*, by utilizing a singular monetary average deduction per well and disregarding the calculation of a percentage of gross receipts derived from natural gas. *See* Paragraph Nos. 12 and 13 of the Affidavit of Cynthia R. Hoover, Tax & Revenue Manager of the West Virginia Property Tax Division, Special Properties Section (the "Hoover Affidavit") (A.R. 2082), attached to the Tax Department's Motion for Summary Judgment filed with the Circuit Court. (A.R. 2075).

Starting with the second full paragraph on Page 4 of Petitioner's brief filed herein and running all the way to the beginning of Section B. Statement of Facts on the top of Page 6 (the "Disregarded Section No. 1"), this Court should disregard all of the statements and materials contained therein for the following reasons:

1. Since the issues and materials raised in Disregarded Section No. 1 and in Assignments of Error Numbers 2 through 5 were not raised by Petitioner in the Circuit Court at the time the Circuit Court entered its June 15, 2020 Summary Judgment Order and since the Circuit Court's June 15, 2020 Summary Judgment

Order is the subject of this appeal, as it is the only order appealed by Petitioner, this Court, acting only as an appellate court in this case, does not have jurisdiction to consider and decide these issues and materials not acted upon by the Circuit Court. *See Western Auto Supply Co. v. Dillard*, 153 W.Va. 678, 172 S.E.2d 388 (1970), *infra.*;

2. Regarding Petitioner's claim for a deduction for post-production expenses, this Court, in *Steager*, has already analyzed and upheld the Tax Department's exclusion of Petitioner's post-production expenses from the average operating expense calculation. *Steager*, 242 W.Va. at 223, 832 S.E.2d at 149. Petitioner was a party in the *Steager* case where Petitioner made the exact same claim for the deductibility of post-production expenses; and

3. By this Court's Corrected Order dated January 28, 2021 (the "January 28, 2021 Corrected Order"), this Court refused Petitioner's motion under Rule 7(g) of the Rules of Appellate Procedure to supplement the appeal record to this Court to include additional matters Petitioner claims supports Petitioner's statements made in the Disregarded Section No. 1 and the Assignments of Error Numbers 2 through 5 in Petitioner's appeal brief. With the entry of this Court's January 28, 2021 Corrected Order, the additional matters claimed by Petitioner to support Petitioner's statements made in the Disregarded Section No. 1 and the Assignments of Error Numbers 2 through 5 are not part of and are not included in the appeal record to this Court.

B. STATEMENT OF FACTS

Any attempt by Petitioner to argue that it should be entitled to deduct its post-production expenses are disputed by the County Commission and must be disregarded because: (i) this Court in *Steager* has already analyzed and upheld the Tax Department's exclusion of Petitioner's post-production expenses from the average operating expense calculation. *Steager*, 242 W.Va. at 223, 832 S.E.2d at 149, and (ii) this Court in *Steager* has already ruled that Petitioner is not entitled to deduct its actual expenses. Footnote 13 of *Steager*.

Starting with the last paragraph on the bottom of Page 10 of Petitioner's brief filed herein and running all the way to the end of the Statement of the Case section on the middle of Page 12 (the "Disregarded Section No. 2"), this Court should disregard all of the statements and materials contained therein for the same reasons set forth above related to Disregarded Section No. 1, namely, (1) this Court lacks original jurisdiction to consider such statements and materials, (2) this Court, in *Steager*, has already analyzed and upheld the Tax Department's exclusion of Petitioner's post-production expenses from the average operating expense calculation, and (3) with the entry of this Court's January 28, 2021 Corrected Order, the additional matters claimed by Petitioner to support Petitioner's statements made in the Disregarded Section No. 2 and the Assignments of Error Numbers 2 through 5 are not part of and are not included in the appeal record to this Court.

II. SUMMARY OF ARGUMENT

A. Summary of Argument Related to Petitioner's Assignments of Error Number 1

The Circuit Court did not err when it granted the Respondents' Motions for Summary Judgment and denied Petitioner's Motion for Summary Judgment for the following reasons: (i) Petitioner's objection to the Oil and Gas Well Methodology is not part of the appeal record from

the County Commission to the Circuit Court, and therefore, should not even have been considered by the Circuit Court; (ii) Petitioner waived its right to object to Oil and Gas Well Methodology by failing to raise the objection in the initial appeal to this Court in 2018; (iii) West Virginia's mandate rule precluded the Circuit Court from granting relief to Petitioner arising from Petitioner's objection to the Oil and Gas Well Methodology, (iv) Petitioner is not entitled to summary judgment because Petitioner failed to provide documents of sufficient evidentiary quality to support its Motion for Summary Judgment in the Circuit Court; and (v) Petitioner's revaluations of its wells are not supported by this Court's holding in *Steager*.

B. Summary of Argument Related to Petitioner's Assignments of Error Numbers 2 through 5

Petitioner's Assignments of Error Numbers 2 through 5 are not grounds for reversal for the following reasons: (i) Since Assignments of Error Numbers 2 through 5 were not acted upon by the Circuit Court, this Court does not have jurisdiction to even consider Assignments of Error Numbers 2 through 5; (ii) the matters claim by Petitioner that support Assignments of Error Numbers 2 through 5 are not part of the appeal record before this Court; (iii) this Court in *Steager* has already upheld the Tax Department's exclusion of post-production expenses from its average expense calculation; and (iv) this Court in *Steager* has already ruled that Petitioner is not permitted to deduct its actual expenses, whether they be post-production expenses or otherwise.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to the Rules of Appellate Procedure, the County Commission requests a Rule 20 oral argument in this case because it involves fundamental issues regarding the valuation of wells that produce both oil and gas wells for *ad valorem* property tax purposes.

IV. ARGUMENT

A. STANDARD OF REVIEW

"A circuit court's entry of summary judgment is reviewed *de novo*." *Painter v. Peavy*, 192 W. Va. 189, 192, 451 S.E.2d 755, 758 (1994). However, under West Virginia law, the valuations of property for *ad valorem* property tax purposes fixed by an assessing officer are presumed to be correct.

> As a general rule, there is a presumption that valuations for taxation purposes fixed by an assessor are correct. . . . The burden is on the taxpayer challenging the assessment to demonstrate by clear and convincing evidence that the tax assessment is erroneous. Syllabus Pt. 2, in part, *Western Pocahontas Properties, Ltd. v. County Com'n of Wetzel County*, 189 W.Va. 322, 431 S.E.2d 661(1993).

B. ARGUMENT RELATED TO PETITIONER'S ASSIGNMENTS OF ERROR NUMBER 1

The Circuit Court did not err in granting the Respondents' Motions for Summary Judgment, holding that the Tax Department's re-valuation of Petitioner's oil and gas wells for TY 2016 is the correct valuation, and denying Petitioner's Motion for Summary Judgment (the "Circuit Court's June 15, 2020 Summary Judgment Order"). (A.R. 2195).

For the very first time in the procedural history of this case, on remand from this Court to the Circuit Court, Petitioner raised an objection to the Oil and Gas Well Methodology. In Footnote 3 of Petitioner's Reply in Opposition to Respondents' Motions for Summary Judgment filed in the

Circuit Court after remand from this Court, Petitioner confirms and admits that it did not raise the Oil and Gas Well Methodology prior to raising it for the first time on remand from this Court in Petitioner's Motion for Summary Judgment filed in the Circuit Court. (A.R. 2097).

In its initial proceedings before the County Commission, Petitioner did not object to or raise the Oil and Gas Well Methodology, so, as a result, the Oil and Gas Well Methodology is not part of the appeal record from the County Commission that was certified to the Circuit Court. The Circuit Court in the present case sat solely as an appellate court, whose determinations are limited by: (i) the record made before the County Commission, *See*, W.Va. Code §11-3-25(c), and (ii) this Court's limited mandate on remand.

In Petitioner's initial Complaint filed in its appeal to the Circuit Court from the decision of the County Commission, Petitioner did not object to or raise the Oil and Gas Well Methodology. Petitioner's initial appeal to the Circuit Court only sought to fix the value of its "gas wells" and "gas" wells only. *See* the prayer for relief in Petitioner's Complaint filed in the Circuit Court. (A.R. 0084). Because the Oil and Gas Well Methodology was not raised by Petitioner in its original appeal to the Circuit Court, the Circuit Court, in its *Order Reversing the Decisions of the Doddridge County Board of Equalization and Review and the Doddridge County Board of Assessment Appeals Upholding the Valuation of Antero's Gas Wells for the 2016 and 2017 Tax Years*, entered on January 17, 2018 (the "Circuit Court's January 17, 2018 Order") (A.R. 0051), which said Order was appealed to this Court by the Respondents herein and was the subject of this Court's analysis in *Steager*, did not address or make a ruling upon the Oil and Gas Well Methodology. The relief in the Circuit Court's January 17, 2018 Order pertained only to setting the value of Petitioner's "gas wells." (A.R. 0068).

In Petitioner's brief filed with this Court in response to Respondents' appeal of the Circuit Court's January 17, 2018 Order, Petitioner argued about the Tax Department's valuations of its natural gas wells only, but did not raise any arguments concerning the Oil and Gas Well Methodology. Because the Oil and Gas Well Methodology was not raised with this Court in the initial appeal back in 2018, the Oil and Gas Well Methodology was not before this Court, it was not considered by this Court, it was not part of this Court's decision in *Steager*, and was not included in this Court's limited mandate to the Circuit Court. This Court's opinion in *Steager* only addressed the Tax Department's valuation of Petitioner's gas wells and not the Tax Department's valuation and taxation of wells that produce both oil **and** gas.

The Circuit Court, recognizing the significance that *Steager* did not address wells that produce both oil and gas, concluded and stated twice in the Conclusions of Law section of the Circuit Court's June 15, 2020 Summary Judgment Order that *Steager* did not address wells that produce both oil and gas. (A.R. 2200, A.R. 2201). In the second such statement, the Circuit Court stated as follows: "The Court notes again that *Steager* did not address wells that produce both oil and gas; instead, it dealt with the appeal of the valuation of gas producing horizontal wells." (A.R. 2201).

1. Since Petitioner's objection to the Oil and Gas Well Methodology is not part of the appeal record from the County Commission to the Circuit Court, the Circuit Court, who is sitting solely in this matter as an appellate court, is prohibited from even considering and deciding Petitioner's objection to the Oil and Gas Well Methodology.

As provided above and as confirmed and admitted by Petitioner in Footnote 3 of its Reply in Opposition to Respondents' Motions for Summary Judgment filed in the Circuit Court after remand from this Court, Petitioner did not raise the Oil and Gas Well Methodology prior to raising

it for the first time on remand from this Court in Petitioner's Motion for Summary Judgment filed in the Circuit Court. (A.R. 2097). This means Petitioner did not raise its objection to the Oil and Gas Well Methodology in front of the County Commission, and, as a consequence, Petitioner's objection to the Oil and Gas Well Methodology is not part of the appeal record from the County Commission to the Circuit Court.

Appeals from county commissions sitting as either Boards of Equalization and Review or Boards of Assessment appeals are governed by W.Va. Code §11-3-25, entitled "Relief in circuit court against erroneous assessment." Specifically, W.Va. Code §11-3-25(c) provides in relevant part as follows:

> (c) If there was an appearance by or on behalf of the taxpayer before either board, or if actual notice, certified by the board, was given to the taxpayer, the appeal, when allowed by the court or judge, in vacation, shall be determined by the court from the record as so certified . . . .

In *In re Stonestreet*, 147 W.Va. 719, 131 S.E.2d 52 (1963), this Court, while analyzing W.Va. Code §11-3-25, held as follows:

> It is manifest, in the consideration of the quoted provisions of Section 25, Article 3, Chapter 11, Code, 1931, as amended, and the provisions of Sections 1, 2, 3, 4 and 5, Article 3, Chapter 58, Code, 1931, to which reference has been made, that when the party who seeks an appeal has appeared before the county court, as did the petitioners here, the appeal dealt with in Section 25 shall, if allowed, be determined from the evidence taken at the hearing before the county court as certified by that court, and that the petition for review shall be heard and determined and the appeal shall be decided upon the original record of the proceeding as defined in Section 4 of the foregoing statute.

In re Stonestreet, 147 W.Va. at 725, 131 S.E.2d at 56.

A clear reading of W.Va. Code §11-3-25(c) and *In re Stonestreet* provides that West Virginia law requires circuit courts, when they are hearing an appeal from the county commission,

the appeal "shall, if allowed, be determined from the evidence taken at the hearing before the county court [county commission] as certified by that court [county commission . . .]" In the present case, since Petitioner's objection to the Oil and Gas Well Methodology is not part of the evidence contained in the appeal record certified from the County Commission to the Circuit Court, the Circuit Court, sitting solely as an appellate court, is prohibited from even considering whether to grant relief to Petitioner based on Petitioner's objection to the Oil and Gas Well Methodology. As a result of the foregoing, the Circuit Court correctly denied Petitioner relief based on its objection to the Oil and Gas Well Methodology, and the Circuit Court's June 15, 2020 Summary Judgment Order must be affirmed.

2. Petitioner has Waived Its Right to Object to the Oil and Gas Well Methodology Under West Virginia's Raise or Waive Rule by Failing to Raise the Objection in the Initial Appeal to the Supreme Court in 2018.

In *Perrine v. E.I. du Pont de Nemours & Co.*, 225 W.Va. 482, 694 S.E.2d 815 (2010), DuPont failed to raise on appeal to this Court a mitigating factor (the cost of litigation to the defendant) supporting a reduction of the punitive damage award entered by the circuit court. This Court held as follows:

> (cc). *The Cost of Litigation to the Defendant.* DuPont has not addressed this issue in its brief to this Court. In Syllabus point 5 of *Garnes,* this Court held that,
>
> > [u]pon petition, this Court will review all punitive damages awards. In our review of the petition, we will consider the same factors that we require the jury and trial judge to consider, and all petitions must address each and every factor set forth in Syllabus Points 3 and 4 of this case with particularity, summarizing the evidence presented to the jury on the subject or to the trial court at the post-judgment review stage. *Assignments of error related to a factor not specifically addressed in the petition will be deemed waived as a matter of state law.*

> 186 W.Va. 656, 413 S.E.2d 897 (emphasis added). Accordingly, because DuPont failed to properly address this issue, it has been waived. *Cf.* Syl. pt. 6, *Addair v. Bryant,* 168 W.Va. 306, 284 S.E.2d 374 (1981) ("Assignments of error that are not argued in the briefs on appeal may be deemed by this Court to be waived.").

Perrine, 225 W.Va. at 558, 694 S.E.2d at 892. (Emphasis added by the Court)

In *Boggess v. Workers' Compensation Div.*, 208 W.Va. 448, 541 S.E.2d 326 (2000), the appellants failed to present scientific evidence to the ALJs or the Appeal Board below in support of appellants' claim on appeal that 85 W. Va. C.S.R. § 85–1–20.8.5(b) is unconstitutional. This Court held as follows:

> Appellants also argue that if section 20.8.5(b) requires use of the Kory predicted normal values, then the rule is unconstitutional as violative of substantive due process principles. No constitutional deficiency is apparent from the language of the rule itself. While Appellants' allegation of constitutional infirmity might have been developed below with an appropriate evidentiary showing, it was not. Due process arguments based upon inherent defects in the Kory predicted values would need support from the scientific community, which Appellants did not present to the ALJs or the Appeal Board. Therefore, under this Court's well-established "raise or waive" rule, we decline to consider today whether section 20.8.5(b) is constitutional. *See* Syl. Pt. 4, *State v. Browning,* 199 W.Va. 417, 485 S.E.2d 1 (1997) ("This Court will not consider an error which is not properly preserved in the record nor apparent on the face of the record.")

Boggess, 208 W.Va. at 453, 541 S.E.2d at 331.

Since Petitioner did not raise any objection to the Oil and Gas Well Methodology before the Circuit Court in its initial appeal from the County Commission in 2017 and did not raise any objection to the Oil and Gas Well Methodology before this Court in the initial appeal in 2018, any objection to the Oil and Gas Well Methodology has been waived, on both levels, and could not have been raised for the first time on remand to the Circuit Court. Actually, in this case, because Petitioner did not raise any objection to the Oil and Gas Well Methodology in either the Circuit Court in Petitioner's initial appeal from the County Commission or in this Court, there is "double waiver." As stated above with emphasis by the Supreme Court in *Perrine*, *supra*, "Assignments of

error related to a factor not specifically addressed in the petition will be deemed waived as a matter of state law." *Perrine*, 225 W.Va. at 558, 694 S.E.2d at 892.

As a result of the foregoing, the Circuit Court correctly denied Petitioner relief based on its objection to the Oil and Gas Well Methodology, and the Circuit Court's June 15, 2020 Summary Judgment Order must be affirmed.

3. West Virginia's Mandate Rule Precluded the Circuit Court from Granting Relief to Petitioner Arising from Petitioner's Objection to the Oil and Gas Well Methodology.

In *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 214 W.Va. 802, 591 S.E.2d 728 (2003), after remand from this Court, the circuit court allowed the landlord to amend its complaint to bring a new claim (the recording act claim) against the tenant (Frazier & Oxley). Frazier & Oxley sought a writ of prohibition against the circuit court judge on the theory that the circuit court judge violated the mandate rule. The Supreme Court explained the mandate rule as follows:

> Of course, here we deal with a case that we remanded [former decided case referred to by the Supreme Court as "*Frazier & Oxley I*"]. In such circumstances, a special aspect of the law of the case doctrine is implicated-the mandate rule. We have explained that under the mandate rule
>
> > [a] circuit court has no power, in a cause decided by the Appellate Court, to re-hear it as to any matter so decided, and, though it must interpret the decree or mandate of the Appellate Court, in entering orders and decrees to carry it into effect, any decree it may enter that is inconsistent with the mandate is erroneous and will be reversed. Syl. Pt. 1, *Johnson v. Gould,* 62 W.Va. 599, 59 S.E. 611 (1907). *See also United States v. Vigneau,* 337 F.3d 62, 67 (1st Cir.2003) ("One aspect of the law of the case doctrine is the 'mandate' rule, which requires a district court to follow the decisions of a higher court.").
>
> Because the recording act claim clearly was not presented in *Frazier & Oxley I,* it could not have been explicitly decided by this Court. Further, nothing in *Frazier & Oxley I* indicates that we implicitly decided the validity of the sublease under the recording act.
>
> However, this does not end our inquiry. *The mandate rule is not limited to matters we decide either explicitly or implicitly on appeal. Rather, when this Court's*

decision of a matter results in the case being remanded to the circuit court for additional proceedings, our mandate controls the framework that the circuit court must use in effecting the remand.

Frazier & Oxley, 214 W.Va. at 808, 591 S.E.2d at 734. (Emphasis added.)

In Syllabus Pt. 2 of its opinion, this Court in *Frazier & Oxley, supra,* explained the difference between a limited remand and a general remand as follows:

> 2. When this Court remands a case to the circuit court, the remand can be either general or limited in scope. Limited remands explicitly outline the issues to be addressed by the circuit court and create a narrow framework within which the circuit court must operate. General remands, in contrast, give circuit courts authority to address all matters as long as remaining consistent with the remand.

The Supreme Court in *Frazier & Oxley, supra,* then went on the hold as follows:

> A limited remand, however, "prohibit[s] relitigation of some issues on remand, or direct[s] that only some expressly severed issues or causes may still be litigated." *Cherokee Water Co. v. Ross,* 698 S.W.2d 363, 366 (Tex.1985) (per curiam). Under a limited remand, "*the court on remand is precluded from considering other issues, or new matters, affecting the cause.*" 5 Am.Jur.2d *Appellate Review* § 787 at 455 (1995) (footnotes omitted). In other words, " '[w]hen the further proceedings are specified in the mandate, the district court is limited to holding such as are directed. When the remand is general, however, the district court is free to decide anything not foreclosed by the mandate.' " *Hicks v. Gates Rubber Co.,* 928 F.2d 966, 971 (10th Cir.1991) (quoting 1B *Moore's Federal Practice* ¶ 0.404[10] (1988) (footnote omitted)).

Frazier & Oxley, 214 W.Va. at 809, 591 S.E.2d at 735. (Emphasis added.)

In *Quicken Loans, Inc. v. Brown,* 236 W.Va. 12, 777 S.E.2d 581 (2014), this Court while approvingly citing from *Frazier & Oxley, supra,* held as follows:

> . . . . A limited remand " 'prohibit[s] relitigation of some issues on remand, or direct[s] that only some expressly severed issues or causes may still be litigated.' " *Frazier & Oxley*, 214 W.Va. at 809, 591 S.E.2d at 735 (quoting *Cherokee Water Co. v. Ross,* 698 S.W.2d 363, 366 (Tex.1985)). "Under a limited remand, the court on remand is precluded from considering other issues, or new matters, affecting the cause." *Id.* (internal quotation omitted); *see also* 5 Am. Jur. 2d *Appellate Review* § 736 (2014) ("Where a remand limits the issues for determination, the court on

> remand is precluded from considering other issues, or new matters, affecting the cause." (Footnote omitted.)). "[W]hen the further proceedings are specified in the mandate, the district court is limited to holding such as are directed." *Hicks v. Gates Rubber Co.*, 928 F.2d 966, 971 (10th Cir.1991) (quoting 1B J. Moore, J. Lucas, T. Currier, *Moore's Federal Practice* ¶ 0.404[10] (1998)); *see also* 5 Am. Jur. *Appellate Review* § 736 (2014) ("When a case is remanded for a specific act, the entire case is not reopened, but rather the lower tribunal is only authorized to carry out the appellate court's mandate, and the trial court may be powerless to undertake any proceedings beyond those specified." (Footnote omitted.)). Thus, when the Court orders a limited remand, "the lower court cannot reopen the case on the facts, allow the filing of amended or supplemental pleadings, nor retry the case, and if it should do so, the judgment rendered thereon would be void." 5 Am. Jur. *Appellate Review* § 736 (2014).

Quicken Loans, 236 W.Va. at 20, 777 S.E.2d at 589.

In the Circuit Court's June 15, 2020 Summary Judgment Order, the Circuit Court correctly recognized, concluded and stated *twice* that *Steager* did not address wells that produce both oil and gas. (A.R. 2200, A.R. 2201). In the second such statement, the Circuit Court stated as follows: "The Court notes again that *Steager* did not address wells that produce both oil and gas; instead, it dealt with the appeal of the valuation of gas producing horizontal wells." (A.R. 2201).

Since Petitioner's objection to the Oil and Gas Well Methodology was clearly not presented to this Court in the 2018 appeal, it could not have been decided by this Court, and as a result, was not included in or a part of this Court's mandate from *Steager*. Therefore, the mandate from this Court to the Circuit Court was limited; it applied to only gas wells. At both the Circuit Court in Petitioner's initial appeal from the County Commission and at this Court in the 2018 appeal, the relief sought by Petitioner pertained solely to "gas wells" and "gas" wells only. Petitioner's raising its objection to the Oil and Gas Well Methodology for the first time on remand from *Steager* was outside the scope of the mandate. The Circuit Court was precluded from even considering Petitioner's objection to the Oil and Gas Well Methodology, and, if it had considered the objection,

"the judgment rendered thereon would be void." *Quicken Loans,* 236 W.Va. at 20, 777 S.E.2d at 589.

Further, because Petitioner's objection to the Oil and Gas Well Methodology was waived by Petitioner (*See* Section 2 above), such waiver also demonstrates the mandate does not include Petitioner's objection to the Oil and Gas Well Methodology. Petitioner's objection to the Oil and Gas Well Methodology was never "in the breast of this Court" on appeal. Therefore, Petitioner's objection to the Oil and Gas Well Methodology could not be part of the mandate because it was never part of what this Court considered and decided in *Steager*. Logically, if an issue was not before this Court, it was not considered by this Court; if it was not considered by this Court, it was not part of this Court's decision; if it was not part of this Court's decision, it is not within the scope of the decision to remand or the scope of the mandate concerning what is to be addressed by the lower court following remand.

As a result of the foregoing, the Circuit Court correctly denied Petitioner relief based on its objection to the Oil and Gas Well Methodology, and the Circuit Court's June 15, 2020 Summary Judgment Order must be affirmed.

4. Petitioner is not entitled to Summary Judgment because Petitioner failed to provide Documents of Sufficient Evidentiary Quality to support its Motion for Summary Judgment in the Circuit Court.

Under West Virginia law, the valuations of property for *ad valorem* property tax purposes fixed by an assessing officer are presumed to be correct and a taxpayer challenging an assessor's tax assessment must prove by clear and convincing evidence that such tax assessment is erroneous.

> As a general rule, there is a presumption that valuations for taxation purposes fixed by an assessor are correct. . . . The burden is on the taxpayer challenging the

> assessment to demonstrate by clear and convincing evidence that the tax assessment is erroneous.

Syllabus Pt. 2, in part, *Western Pocahontas Properties, Ltd. v. County Com'n of Wetzel County*, 189 W.Va. 322, 431 S.E.2d 661(1993).

Petitioner's burden of proof on remand to the Circuit Court is to show by clear and convincing evidence that the Tax Department's assessment of Petitioner's property is erroneous.

In Syllabus Pt. 1 of *Floyd v. Equitable Life Assur. Soc.*, 164 W.Va. 661, 264 S.E.2d 648 (1980), this Court held as follows:

> 1. When ruling on a motion for summary judgment, the trial court must determine whether there is a genuine issue as to any material fact, and whether the moving party is entitled to judgment as a matter of law.

While discussing how circuit courts should analyze motions for summary judgment, this Court in *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W.Va. 692, 474 S.E.2d 872 (1996) held as follows:

> . . . However, "only materials which were included in the pretrial record and that would have been admissible evidence may be considered." *Stults v. Conoco, Inc.*, 76 F.3d 651, 654 (5th Cir.1996). (Citation omitted). *Powderidge*, 196 W.Va. at 698, 474 S.E.2d at 878.

In Footnote 15 of *Ramey v. Contractor Enterprises, Inc.*, 225 W.Va. 424, 693 S.E.2d 789 (2010), this Court held has follows:

> . . . In order to make that determination [what documents to consider when analyzing a motion for summary judgment], the authenticity of documents presented for the court's consideration at the summary judgment stage needs to be established. Ordinarily, "[u]nsworn and unverified documents are not of sufficient evidentiary quality to be given weight in determining whether to grant a motion for summary judgment. Therefore, documents that do not state that they are made under oath and do not recite that the facts stated are true are not competent summary judgment evidence." 49 C.J.S. *Judgments* § 328 (2009). *See also* 11 *Moore's Federal Practice,* § 56.10[4][c] (3d ed. 2010) (in context of summary judgment, unless a document outside of the record "is self-authenticating and intrinsically

trustworthy on its face (a rare situation), this type of document must be introduced by affidavit to ensure its consideration by the court.").

As stated above, in Footnote 15 from *Ramey*, "[u]nsworn and unverified documents are not of sufficient evidentiary quality to be given weight in determining whether to grant a motion for summary judgment." Petitioner's revaluation spreadsheet attached to Petitioner's Motion for Summary Judgment and its accompanying Memorandum in Support (A.R. 2037-2050) is unsworn and unverified and does not otherwise fall within the evidence listed in Rule 56 that may be considered. It is truly a bunch of self-serving, unverified numbers. The Circuit Court had no way of determining the correctness or accuracy of the numbers on Petitioner's revaluation spreadsheet.

Further, Petitioner's burden of proof in challenging the Tax Department's assessment must demonstrate by clear and convincing evidence that the tax assessment is erroneous. *See*, Syl. pt. 2, *Western Pocahontas Properties, supra.* As Petitioner failed to properly support its Motion for Summary Judgment with documents of sufficient evidentiary quality, Petitioner's Motion for Summary Judgment fails to meet the heavy evidentiary burden required by Syl. pt. 2, *Western Pocahontas Properties, supra.*

In contrast, the Tax Department's revaluations as contained in the Tax Department's Motion for Summary Judgment (the "Tax Department's Motion for Summary Judgment") (A.R. 2075), (which revaluations the County Commission supports) are properly supported by the Hoover Affidavit (A.R. 2082), attached to the Tax Department's Motion for Summary Judgment. Ms. Hoover is the person at the Tax Department who revalued Petitioner's wells. Ms. Hoover's revaluations are presumed to be correct by West Virginia law. *See*, Syl.pt. 2, *Western Pocahontas Properties, supra.*

Paragraph No. 12 of the Hoover Affidavit states as follows:

12. For wells that produced only natural gas, I utilized a deduction of $150,000 per well and disregarded the calculation of 20% percent of gross receipts derived from natural gas.

(A.R. 2083).

Utilizing a deduction of $150,000 per well for "natural gas" wells and disregarding the calculation of 20% percent of gross receipts derived from natural gas is not only consistent with this Court's holding in *Steager*, it also follows this Court's limited mandate.

As a result of the foregoing, the Circuit Court correctly denied Petitioner relief based on its objection to the Oil and Gas Well Methodology, and the Circuit Court's June 15, 2020 Summary Judgment Order must be affirmed.

5. Petitioner's Revaluations are not Supported by this Court's Holding in *Steager*.

Syllabus Pt. 12 of *Steager, supra,* provides as follows:

12. The provisions contained in West Virginia Code of State Rules §§ 110-1J-4.1 and 110-1J-4.3 (2005) for a deduction of the average annual industry operating expense requires the use of a singular monetary average deduction.

As the Oil and Gas Well Methodology was not before this Court when it decided *Steager*, this Court's ruling in *Steager* requiring "the use of a singular monetary average deduction" applies to wells that only produce natural gas (allowing a deduction of the average annual industry operating expense in the amount of $150,000) and, by analogy, to wells that only produce oil (allowing a deduction of the average annual industry operating expense in the amount of $5,750). Because Petitioner failed to raise the Oil and Gas Well Methodology in the Circuit Court and in this Court in the 2018 appeal, this Court in *Steager* did not address the Tax Department's treatment of wells that produce both oil and gas.

In Petitioner's Motion for Summary Judgment, Petitioner claims for the first time in the procedural history of this case that its wells that produce both oil and gas are entitled to take two (2) average annual industry operating expense deductions: $150,000 for the gas produced by the well and $5,750 for the oil produced by the well for a total deduction of $155,750. (A.R. 2043). *Steager* requires "the use of a *singular* monetary average deduction" for each well (Emphasis added.) and not the use of *multiple* deductions for each well as argued by Petitioner. *Steager* simply does not authorize Petitioner taking multiple expense deductions for a single well.

As a result of the foregoing, the Circuit Court correctly denied Petitioner relief based on its objection to the Oil and Gas Well Methodology, and the Circuit Court's June 15, 2020 Summary Judgment Order must be affirmed.

C. ARGUMENT RELATED TO PETITIONER'S ASSIGNMENTS OF ERRORS NUMBERS 2 THROUGH 5

Petitioner's Assignments of Error Numbers 2 through 5 ("Assignments of Error Numbers 2 through 5") do not warrant reversal of the Circuit Court's June 15, 2020 Summary Judgment Order for the following reasons:

1. Since Assignments of Error Numbers 2 through 5 were not acted upon by the Circuit Court, this Court, having no original jurisdiction of the present case and acting only as an appellate court, does not have jurisdiction to even consider Assignments of Error Numbers 2 through 5.

The issues raised in Assignments of Error Numbers 2 through 5 were not raised by Petitioner in the Circuit Court, and, as a consequence, they were not acted upon by the Circuit Court at the time the Circuit Court's June 15, 2020 Summary Judgment Order was entered.

This Court in *Western Auto Supply Co. v. Dillard*, 153 W.Va. 678, 172 S.E.2d 388 (1970) when faced with an issue that was not acted upon by the circuit court, held as follows:

> As this question was not raised and passed upon by the circuit court, it will not be considered by this Court on this appeal. Many cases hold that this Court will not consider on appeal nonjurisdictional questions which have not been acted upon by the trial court. [String citations omitted] In Re: Morgan Hotel Corporation, 151 W.Va. 357, 151 S.E.2d 676; Korzun v. Shahan, 151 W.Va. 243, 151 S.E.2d 287; Work v. Rogerson, 149 W.Va. 493, 142 S.E.2d 188; Pettry v. The Chesapeake and Ohio Railway Company, 148 W.Va. 443, 135 S.E.2d 729; Dunning v. Barlow and Wisler, Inc., 148 W.Va. 206, 133 S.E.2d 784; Aetna Casualty and Surety Company v. Federal Insurance Company of New York, 148 W.Va. 160, 133 S.E.2d 770; Sands v. Security Trust Company, 143 W.Va. 522, 102 S.E.2d 733; In Re: 'The Estate of Amanda Nicholas, Deceased, 142 W.Va. 80, 94 S.E.2d 452; Cook v. Collins, 131 W.Va. 475, 48 S.E.2d 161; Highland v. Davis, 119 W.Va. 501, 195 S.E. 604; Nuzum v. Nuzum, 77 W.Va. 202, 87 S.E. 463.
>
> In the *Cook* case [*Cook v. Collins*, 131 W.Va. 475, 48 S.E.2d 161] this Court said: 'This Court, having no original jurisdiction of this cause and acting only as an appellate court, will not consider nonjurisdictional questions not acted upon by the trial court. * * *. To consider and decide nonjurisdictional questions in this Court, not acted upon by the trial court, would be the assumption of jurisdiction by this Court which it does not possess.' In the *Highland* case [*Highland v. Davis*, 119 W.Va. 501, 195 S.E. 604] this Court held in point 4 of the syllabus that 'This Court will not consider questions not acted upon by the trial court.' See also *Weatherford v. Arter*, 135 W.Va. 391, 63 S.E.2d 572; *Weese v. Weese*, 134 W.Va. 233, 58 S.E.2d 801; *Posten v. Baltimore and Ohio Railroad Company*, 93 W.Va. 612, 117 S.E. 491.

Western Auto Supply Co. at 153 W.Va. at 680, 172 S.E.2d at 390.

Based on the above-quoted language from *Western Auto Supply Co.*, since the circuit court did not act upon the issues raised in Assignments of Error Numbers 2 through 5, it is clear that this Court does not have jurisdiction to even consider or decide the issues raised in Assignments of Error Numbers 2 through 5. Therefore, Assignments of Error Numbers 2 through 5 do not warrant reversal of Circuit Court's June 15, 2020 Summary Judgment Order.

2. Even if this Court finds that it has original jurisdiction over the present case, the matters claimed by Petitioner that support Assignments of Error Numbers 2 through 5 are not part of the appeal record before this Court.

By Corrected Order dated January 28, 2021 (the "Corrected Order"), this Court refused Petitioner's motion under Rule 7(g) of the Rules of Appellate Procedure to supplement the appeal record to this Court to include additional matters Petitioner claims supports Assignments of Error Numbers 2 through 5. With the entry of the Corrected Order, the additional matters claimed by Petitioner to support Assignments of Error Numbers 2 through 5 are not part of and are not included in the appeal record to this Court.

In Syllabus Pt. 2 of *Proudfoot v. Proudfoot*, 214 W.Va. 841, 591 S.E.2d 767 (2003), this Court held has follows:

> The appellate review of a ruling of a circuit court is limited to the very record there made and will not take into consideration any matter which is not a part of that record. Citing Syllabus Point 2, *State v. Bosley,* 159 W.Va. 67, 218 S.E.2d 894 (1975).

Based on the above-quoted syllabus point from *Proudfoot*, since the additional matters claimed by Petitioner to support Assignments of Error Numbers 2 through 5 are not part of and are not included in the appeal record to this Court, this Court cannot even consider whether the issues raised in Assignments of Error Numbers 2 through 5 are grounds for reversal. Therefore, Assignments of Error Numbers 2 through 5 do not warrant reversal of Circuit Court's June 15, 2020 Summary Judgment Order.

3. Even if this Court finds that it has original jurisdiction over the present case, this Court, in *Steager,* has already upheld the Tax Department's exclusion of post-production expenses from its average expense calculation.

This Court, in *Steager,* has already analyzed and upheld the Tax Department's exclusion of Petitioner's post-production expenses, i.e., gathering, compressing, processing and transporting

expenses, from the average operating expense calculation. Petitioner was a party in the *Steager* case where Petitioner made the exact same claim for the deductibility of post-production expenses.

After setting forth the test for reviewing an agency's interpretation of a legislative rule, this Court in *Steager*, sustained the Tax Department's exclusion of Petitioner's post-production expenses and held has follows:

> With these limitations, we cannot say that the Tax Department's position that gathering, compressing, processing, and transporting expenses are not "directly related" to the "maintenance and production" of natural gas is arbitrary, capricious, or manifestly contrary to the enabling taxation statute. In accordance with our precedent, its position "must be sustained if it falls within the range of permissible construction." *W. Va. Health Care Cost Review Auth.*, 196 W. Va. at 339, 472 S.E.2d at 424. More importantly, the equity of such an interpretation is well beyond the reach of this Court under these circumstances. It is sufficient to conclude that the Tax Department's exclusion of these expenses from its average expense calculation is a reasonable construction of the regulation and not facially inconsistent with the enabling statute.

Steager, 242 W.Va. at 223, 832 S.E.2d at 149.

Since this Court has already ruled that the Tax Department's exclusion of Petitioner's post-production expenses is permissible, the issues raised in Assignments of Error Numbers 2 through 5 are not grounds for reversal. Therefore, Assignments of Error Numbers 2 through 5 do not warrant reversal of Circuit Court's June 15, 2020 Summary Judgment Order.

4. Even if this Court finds that it has original jurisdiction over the present case, this Court, in *Steager*, has already ruled that Petitioner is not permitted to deduct its actual expenses, whether they be post-production expenses or otherwise.

This Court, in *Steager*, has already determined that Petitioner is not permitted to deduct its actual expenses, whether they be post-production expenses or otherwise. W.Va. Code St. R. § 110-1J-4.3 requires the calculation of the "average annual industry operating expense" per well every

five years for use in the ad valorem property tax valuation for producing oil and gas wells, and provides that "The average annual industry operating expenses shall be deducted from working interest gross receipts to develop an income stream..."

This Court in the *Steager* case, in Footnote 13, stated in relevant part as follows: "The Tax Department dedicates much of its briefing arguing that respondents are not permitted to deduct their *actual* expenses. This is correct . . ." (Emphasis added by the Court.) Because this Court has already determined that Petitioner cannot deduct its "actual" expenses, whether they be post-production expenses or otherwise, the issues raised in Assignments of Error Numbers 2 through 5 are not grounds for reversal. Therefore, Assignments of Error Numbers 2 through 5 do not warrant reversal of Circuit Court's June 15, 2020 Summary Judgment Order.

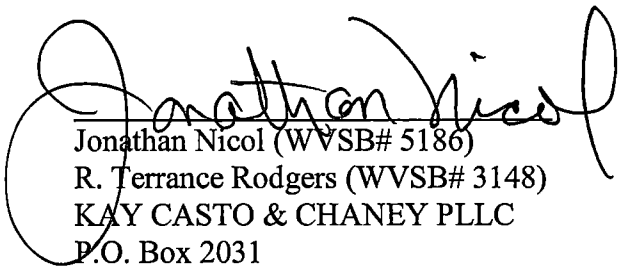
V. CONCLUSION

This Court should affirm the Circuit Court's June 15, 2020 Summary Judgment Order granting the Respondents' Motions for Summary Judgment, holding that the Tax Department's re-valuation of Petitioner's oil and gas wells for TY 2016 is the correct valuation, and denying Petitioner's Motion for Summary Judgment. Further, this Court should declare that Petitioner's Assignments of Error Numbers 2 through 5 are not grounds for reversal of the Circuit Court's June 15, 2020 Summary Judgment Order granting the Respondents' Motions for Summary Judgment and denying Petitioner's Motion for Summary Judgment.

Respectfully Submitted,

The County Commission of Doddridge County, sitting as the Board of Assessment Appeals

By Counsel,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Appeal No. 20-0530

ANTERO RESOURCE CORPORATION,
Petitioner Below, Petitioner,

v.

Doddridge County Circuit Court
Civil Action No. 17-AA-1
Judge Christopher Wilkes

THE HONORABLE DALE STEAGER,
West Virginia State Tax Commissioner,
THE HONORABLE DAVID SPONAUGLE,
Assessor of Doddridge County, and
THE COUNTY COMMISSION OF DODDRIDGE COUNTY,
Respondents Below, Respondents.

CERTIFICATE OF SERVICE

I, Jonathan Nicol, hereby certify that I served the foregoing BRIEF OF RESPONDENT, THE COUNTY COMMISSION OF DODDRIDGE COUNTY upon counsel of record, on this 1st day of March, 2021, by placing true and exact copies of the same in the U.S. mail, first-class postage prepaid, to:

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